Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 75-1030

THEODORE WOROZBYT

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 27, 1975, and a Motion for Rehearing En Banc denied on October 20, 1975.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals is reproduced and attached to this Brief as "Appendix A."

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Where a person subpoenaed before a grand jury bases his refusal to testify on the ground that the questions to be put to him are the product of unlawful electronic surveillance, is an *in camera* examination of the underlying documents submitted in support of the application to conduct electronic surveillance sufficient compliance with *Gelbard* v. *United States,* 408 U.S. 41 (1972), or is the subpoenaed witness entitled to personally examine these underlying documents in an adversary atmosphere in the absence of a countervailing claim justifying secrecy before he may be committed for civil contempt under 28 U.S.C. Section 1826?

STATUTES INVOLVED

This case arose under 28 U.S.C. Section 1826 which provides:

> "Whenever a witness in any proceeding before . . . any . . . grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal . . . may summarily order his confinement . . . until such time as the witness is willing to give such testimony . . . No period of confinement shall exceed the life of—
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

STATEMENT OF THE CASE

The Petitioner was ordered to appear before a grand jury to testify relating to the affairs of one Irvin Berlin. He refused to testify on the ground that the inquiry was the result of an illegal wiretap. He maintained that he had a right to examine the underlying affidavits to see that, at the very least, they were facially valid.

The District Court for the Northern District of Georgia, Moye, J., rejected his contention. The Court made an *in camera* review and finding the documents facially valid sentenced him to jail for the life of the grand jury.

Appeal and Motion for Rehearing En Banc followed and the decision below was affirmed.

REASONS FOR GRANTING THE WRIT

I

There Is Conflict Among the Circuits

There is conflict among the Circuits as to whether or not a witness summoned before a grand jury is entitled to see the affidavits supporting the wiretap which resulted in his being subpoenaed.

The Second Circuit, in *In Re Persico*, 491 F. 2d 1156 (2d Cir. 1974), held that he was not, but that an *in camera* examination was sufficient.

The First Circuit, however, took the opposite view in *In Re Lochiatto*, 497 F. 2d 803 (1st Cir. 1974). The Court, while not granting a plenary hearing, did require that the witness be allowed to examine and challenge the facial validity of the documents.

II

If There Is No Reason for Secrecy, Then the Affidavits Should Be Disgorged

The Government, in a typically arrogant fashion, has refused to allow the Petitioner to see the underlying affidavits submitted in support of the wiretap application which led to his being subpoenaed. As a reason it has merely maintained that a witness subpoenaed before a grand jury is not entitled, in spite of *Gelbard, supra*, to see what led to his being hailed before the grand jury.

That is no reason at all.

Here the Petitioner did not seek a plenary hearing. All that he asked is that he be allowed to examine the underlying documents in order to see whether they were facially valid. This would have halted the grand jury proceedings for about ten minutes.

But the Court, agreeing with the Government, felt that an *in camera* examination was sufficient and that an adversary proceeding was unnecessary.

This Court should decide whether, in these circumstances, secrecy serves any legitimate governmental purpose; whether secrecy enhances the criminal justice system; whether, indeed, there was any justification for secrecy in this case.

Government secrecy should, in the absence of countervailing justification, have no santification by this or any other court. The sorry history of the role that government secrecy has played in our system shows that it is the refuge of scoundrels and malefactors. It has no place in a society that is free and wants to remain free.

CONCLUSION

It is clear that there is conflict among the Circuits on this issue. This conflict can be resolved only by this Court.

The rule of secrecy under which the government desires to operate should be stopped. It is only by having an open government that this nation can protect its basic freedoms.

Respectfully submitted,

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APPENDIX

APPENDIX

In re Grand Jury Proceedings

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 75-3413

Summary Calendar. *

UNITED STATES OF AMERICA, *Appellee*,

v.

THEODORE WOROBYZT, *Appellant*.

Oct. 20, 1975.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and GODBOLD and GEE, Circuit Judges.

This is an appeal from a civil contempt order entered pursuant to 28 U.S.C. § 1826(a), which allows the court to confine a recalcitrant witness as a means of compelling him to testify. Appellant was subpoenaed to testify before the grand jury concerning a gambling violation. He there refused to answer certain question, asserting that they were founded upon information derived from an illegal wiretap. The district court reviewed the wiretap court orders, affidavits, and applications in camera and found them facially valid; ordered and received an 18 U.S.C. § 3504 (unsworn) denial of unlawful activity by the government; ordered

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* Rule 18, 5th Cir.; see *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York et al.*, 5th Cir., 1970, 431 F.2d 409, Part I.

defendant to testify to specific questions; and held defendant in contempt for his refusal to do so. Defendant had demanded a form of adversary evidentiary hearing on the validity of the court-ordered electronic surveillance documents, the product of which provided the basis of the questions asked him in the grand jury proceeding. His position below and here is accurately, if picturesquely, epitomized by the following matter from his brief:

> The Petitioner herein did not seek a full-blown adversary hearing gone beyond the bounds of necessity and good sense. All that he sought was the opportunity to examine the underlying affidavits and the order authorizing the tap, in short, a peek. Instead he was told that he had to settle for an in camera examination of these documents or go to jail.

Though appellant is an attorney, he presents no questions of client privilege on this appeal.[1] Nor does he advance Fifth Amendment rights. He does rely on Fourth Amendment rights and rights under the statutory "exclusionary rule" of 18 U.S.C. § 2515, applicable to electronic surveillance.

His Fourth Amendment arguments are shortly answered: a grand jury witness cannot refuse to answer questions on the ground that they are the product of unlawful searches and seizures. The Court-fashioned exclusionary rule, a remedy and not a right, does not extend so far. *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Appellant's § 2515 claim, however, raises a question open in Supreme Court precedent[2] and in this

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[1] Though some were implicated at one stage below.

[2] *Gelbard* v. *United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed. 2d 179 (1972), relied on by appellant, does not reach it since there the surveillance was assumed illegal. *Id.* at 47 & 61 n. 22, 92 S.Ct. at 2360 & 2368 n. 22, 33 L.Ed.2d 186 & 194 n. 22.

circuit:[3] the appropriate scope of inquiry where, in grand jury proceedings, the legitimacy of a court-ordered wiretap is challenged as a basis for refusal to answer questions founded on information derived from the surveillance. We are not, however, without guidance in our inquiry, for several of our sister circuits have considered the question and spoken—with essentially one voice.

The earliest of these authorities, and perhaps the seminal one, is the opinion of the Second Circuit in *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924, 95 S.Ct. 199, 42 L.Ed.2d 158 (1974). In *Perisco* the court noted Mr. Justice White's suggestion in his concurring opinion in *Gelbard* v. *United States*, 408 U.S. 41, 70, 92 S.Ct. 2357, 2372, 33 L.Ed.2d 179, 200 (1972), that when government surveillance has been authorized by a court order a suppression hearing requirement would give undue weight to marginally useful procedural safeguards at the expense of disrupting grand jury proceedings. The Second Circuit then examined the legislative history of Congress' surveillance regulation scheme and concluded that the scales tip in favor of preserving efficient operation of the grand jury process when an in camera inspection reveals that a court-ordered wiretap is facially valid.[4]

The ninth Circuit recently relied on *Perisco* in reaching the same conclusion.[5] And the Third Circuit arrived at

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[3] Our opinion in *United States* v. *Stevens*, 510 F.2d 1101 (5th Cir. 1975), did not reach it since a prior proceeding had already found the surveillance valid.

[4] The Second Circuit recently reaffirmed *Persico* in *In re Vigorito*, 499 F.2d 1351 (2d Cir.), *cert. denied*, 419 U.S. 1056, 95 S.Ct. 640, 42 L.Ed.2d 654 (1974). The court remarked that in *Persico* they had accepted Mr. Justice White's suggestion.

[5] *Droback* v. *United States*, 509 F.2d 625 (9th Cir. 1974), *cert. denied*, — U.S. —, 95 S.Ct. 1952, 44 L.Ed.2d 450 (1975).

the same conclusion by a different route.[6] The only dissenting voice is the First Circuit, which in *In re Lochiatto,* 497 F.2d 803 (1st Cir. 1974), held that unless the government objects on secrecy grounds,[7] a grand jury witness can demand an opportunity to inspect the documents authoring the challenged surveillance. Defendant here insists on the same right.

Thus, the only point of disagreement in any authority is the minor additional right of inspection given in *Lochiatto.* Insofar as *Lochiatto* conflicts with *Perisco,* we choose to follow the latter. The relevant facts make this case indistinguishable from *Perisco,*[8] and we think the rule there the proper one. Where the only question raised is the facial regularity of a wiretap authorization,[9] we prefer to rely on the district judge's in camera determination. The lower court stayed well within its bounds in adopting the procedure that it did.

The order of the district court is affirmed.

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[6] *United States* v. *D'Andrea,* 495 F.2d 1170, 1174 (3d Cir.) (per curiam), *cert. denied,* 419 U.S. 855, 95 S.Ct. 101, 42 L.Ed.2d 88 (1974).

[7] Which then requires an in camera determination of the facial validity of the surveillance.

[8] *Persico* involved an immunized witness. Defendant here asserts no Fifth Amendment rights on appeal, so we never reach the immunization issue, but, in any event, this distinction is inconsequential.

[9] This Circuit's opinion in *United States* v. *Stevens,* 510 F.2d 1101 (5th Cir. 1975), answers most other questions concerning the sufficiency of the government's § 3504 response to a general attack in a grand jury investigation on the validity of electronic surveillance.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1030

THEODORE WOROZBYT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner refused to testify before a grand jury on the ground that the questions were based on information obtained from an unlawful wiretap. He contends that the district court's *in camera* examination of the wire interception orders and supporting papers was inadequate to determine the facial validity of the orders in a civil contempt proceeding.

1. On August 21, 1975, petitioner was subpoenaed to testify before a grand jury of the United States District Court for the Northern District of Georgia that was investigating illegal gambling operations. He refused to answer questions, contending *inter alia* that they were the product of unlawful electronic surveillance (August 21, 1975 GJ Tr. 5-8). The government conceded that the questions propounded to petitioner were derived from electronic surveillance, 18 U.S.C. 3504, but stated that the surveillance had been lawfully conducted pursuant to two court orders.

The district court declined petitioner's suggestion to hold an evidentiary hearing on his claim that the wire interception orders were facially invalid, but conducted an *in camera* inspection of the orders, applications, and affidavits. After review of these documents, the court concluded that the wiretap orders were valid on their face and ordered petitioner to testify (August 21, 1975 GJ Tr. 5; August 27, 1975 11:30 a.m. GJ Tr. 6; August 27, 1975 12:00 noon Tr. 6-8). When petitioner again refused to answer any questions before the grand jury, he was held in civil contempt, pursuant to 28 U.S.C. 1826(a), and was ordered confined for the life of the grand jury (nine months) or until such earlier time as he purged himself of the contempt (August 27, 1975 2:00 p.m. GJ Tr. 4-5; Gov. App. 45).[1] The court of appeals affirmed (Pet. App. 1a-4a; 522 F.2d 196).

2. The petition for a writ of certiorari in this civil case was filed out of time. The judgment of the court of appeals was entered on October 20, 1975. The time for filing a petition for a writ of certiorari was not extended and, accordingly, the period provided by 28 U.S.C. 2101(c) and Rule 34(1), Sup. Ct. R., expired on Monday, January 19, 1976. Since the petition was filed on January 20, 1976, this Court lacks jurisdiction to entertain it. *Department of Banking* v. *Pink*, 317 U.S. 264; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399.[2]

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[1]"Gov. App." refers to the appendix filed with the government's brief in the court of appeals.

[2]The record indicates that petitioner filed an out-of-time motion for rehearing *en banc* on November 12, 1975, which the court of appeals denied on December 17, 1975. A party's suggestion of rehearing *en banc* does not "affect the finality of the judgment of the court of appeals * * * ." Rule 35(c), Fed. R. App. P. Thus, the date of the final judgment of the court of appeals remains October 20, 1975. We have been advised by the clerk of the court of appeals that petitioner did not file a petition for rehearing under Rule 40(a), Fed. R. App. P.

3. In any event, there is no reason for further review. Petitioner's sole contention is that the decision below conflicts with *In re Lochiatto*, 497 F.2d 803 (C.A. 1). The First Circuit held in *Lochiatto* that, at least in the absence of government objection to disclosure on the ground of secrecy, a grand jury witness who refuses to testify because of illegal electronic surveillance should be permitted to examine the wiretap order, application, and supporting affidavits. That ruling, however, was expressly limited to instances in which the witness based his refusal to testify on the assertion that "the communication was unlawfully intercepted," in violation of 18 U.S.C. 2518(10)(a)(i), or that "the interception was not made in conformity with the order of authorization or approval," in violation of 18 U.S.C. 2518(10)(a)(iii). 497 F.2d at 807-808.

When the witness' claim, as in the present case, was that "the order of authorization * * * under which [the communication] was intercepted is insufficient on its face," in violation of 18 U.S.C. 2518(10)(a)(ii), the First Circuit is in full agreement with the other courts of appeals[3] that "facial viewing by the court [is] sufficient to demonstrate facial validity or invalidity," and that an evidentiary examination by the witness is not required. *In re Lochiatto, supra*, 497 F.2d at 808. See also *In re Mintzer*, 511 F.2d 471 (C.A. 1); *In re Dunn*, 507 F.2d 195 (C.A. 1). Thus, even under *Lochiatto* petitioner would have been entitled only to an *in camera* inspection by the court.[4]

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[3]See also *Droback* v. *United States*, 509 F.2d 625 (C.A. 9), certiorari denied, 421 U.S. 964; *In re Persico*, 491 F.2d 1156 (C.A. 2), certiorari denied, 419 U.S. 924.

[4]It also appears that this case is moot. Petitioner, who had been free on bail pending appeal, was not incarcerated after the court of appeals' ruling because of his representations to the district court that he would

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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agree to appear before the grand jury and would not assert the electronic surveillance as a basis for his refusal to testify. We have been informed that it is the intention of the Department of Justice to summon petitioner before the grand jury in the near future.